IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-29

PETER M. ROBERTS,
Plaintiff-Petitioner,

vs.

SEARS, ROEBUCK & CO., a corporation,
Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PLAINTIFF'S REPLY BRIEF

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PLAINTIFF'S REPLY BRIEF

I.

SEARS MISCONCEIVES THE NATURE OF THIS ACTION FOR RESTITUTION IN POSTULATING ITS "ADDITUR" ARGUMENT.

Once the basic nature of this action for rescission and restitution is understood and carefully adhered to as the correct focal point of discussion, Sears' "additur" argument which rests on a mischaracterization of this case as simply an action for damages, can and should be put aside. Plaintiff's complaint and amendments have consistently and correctly asserted his theory that

because of Sears' gross misconduct, plaintiff has the right to ask the court to rescind the fraudulently induced agreement, to obtain restitution and the return of his property and to deprive Sears of its unjust enrichment. Contrary to Sears' effort at misdirection, this case is not now and has never been simply a claim for damages, the premise on which Sears asserts its dual diversionary argument that the trial court has no power to grant an "additur" and that the evidence concerning "damages" only supports the $1 million verdict the jury reached.

Sears knows this is not simply an action for damages; it affirmatively argued so in the trial court. In speaking of the "gravamen of Plaintiff's Complaint," Sears contended: "Plaintiff seeks rescission of the contract and upon such rescission, injunctive relief, an accounting and damages." Sears then argued: "The case before this Court is *not an action at law for damages* . . . It is a suit to rescind a fully executed contract. . . ." Later in the same Memorandum, Sears reiterated that ". . . the basic action here is for recission of a contract."[1]

Now, however, to prevent the prospect of having to disgorge the unjustly obtained profits it has so far been able to retain because the jury assessment of those profits was performed according to an incorrect instruction of law, Sears cites only damage cases for the incontrovertible proposition that a court cannot increase a jury award in a damage case. However, because plaintiff's claim is one for rescission, which affords plaintiff the remedies of the return of his property and the unjust enrichment Sears obtained, Sears' entire

[1] (Sears) Memorandum In Opposition To Plaintiff's Motion For Jury Trial And In Opposition To His Motion To Bar Trial Of The Validity Of His Patent, at 2, 4, and 8, filed April 9, 1973.

discussion of "additur" to the jury verdict is simply inapposite. Plaintiff does not now and never has asked the court to increase the size of the jury verdict. All of the additur cases cited in Sears' brief in opposition are actions at law seeking only money damages. Thus, *Dimick v. Schiedt*, 293 U.S. 474 (1935) involved personal injuries arising from an auto collision; *DePinto v. Provident Sec. Life Ins. Co.*, 323 F. 2d 826 (9th Cir. 1963) concerned damages for fraud in obtaining funds from a corporation; *United Air Lines, Inc. v. Weiner*, 335 F. 2d 379 (9th Cir. 1974) and *Silverman v. Travelers Insurance Co.*, 277 F. 2d 257 (5th Cir. 1960) involved damages for wrongful death; *Milprint, Inc. v. Donaldson Choc. Co.*, 222 F. 2d 898 (8th Cir. 1955) involved damages for the value of candy wrappers; *New Orleans & N.E. R.R. Co. v. Hewett Oil Co.*, 341 F. 2d 406 (5th Cir. 1965) involved damages for property damage; *Paul Harris Furniture Co. v. Morse*, 7 Ill. App. 2d 452, *rev'd* 10 Ill. 2d 28 (1956) involved damages arising from the work of an independent contractor; *McCaskill v. Quintano*, 350 Ill. App. 374 (1953) involved damages for overcharges under the Rent Control Act; and *American Appraisal Co. v. Pio*, 246 Ill. App. 467 (1927) involved damages to recover the balance due on a contract. In none of these cases, except *DePinto*, was there even a claim of unjust enrichment, and in *DePinto* that issue was not involved in the case on appeal.

As this Court taught in *Ross v. Bernhard*, 396 U.S. 531 (1970), *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), a party's entitlement to have a jury determine disputed questions of fact in a combined legal and equitable action must be jealously guarded. Here, under proper instructions, the jury found Sears guilty of fraud and breach of a confidential relationship, the two

theories upon which plaintiff is entitled to obtain rescission and restitution. Had the jury been properly instructed, it could also have determined the dollar amount of Sears' unjustly obtained profits. However, only the court, sitting as chancellor in this combined action, had the power to effectuate the jury determination of fraud and breach of a confidential relationship by entering an order depriving Sears of the amount of unjust enrichment which either the court or jury could determine. Had the court given a correct instruction, it would have then been in a position to order restitution of the amount of unjustly obtained profits determined by the jury.

Far from being a damage case involving an "additur" issue, plaintiff's request at trial by means of the instruction plaintiff tendered, his request by post trial motion, his request in the Court of Appeals, and his request now on Petition For Writ Of Certiorari has been to effectuate the jury finding of fraud and breach of a confidential relationship by having the court order disgorgement of Sears' unjustly obtained profits. The proper commitment to the jury of certain but not all issues in a combined case was demonstrated in the first-cited opinion of Chief Judge Edelstein in *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F. Supp. 1018 (S.D. N.Y. 1975), 398 F. Supp. 233 (S.D. N.Y. 1975), 418 F. Supp. 254 (S.D. N.Y. 1975), 418 F. Supp. 258 (S.D. N.Y. 1976), rev'd on other grounds, 546 F. 2d 469 (2d Cir. 1976), in which the court held that misappropriation claims were properly triable to a jury, relying upon *Beacon Theatres* and *Ross*, because misappropriation is a legal claim which supports the right to jury trial, even though equitable issues exist and may remain to be tried. In another opinion in the same case [418 F. Supp. 254 (S.D. N.Y. 1975)], Judge Brieant discussed the

remedy to be afforded, saying: "However this case may be presented to the jury upon plaintiff's contract, quasi-contract and tort theories, relief, whether at law or in equity, will issue only once." In this case, the relief that Peter Roberts sought at trial was entirely consistent with Judge Brieant's observation in *Prudential*, that there should be only one entry of judgment affording one form of relief. The point simply is that it is entirely permissible, if not required, that the court enter such orders as will fully effectuate the factual findings of the jury and afford the complete remedy which the law allows.

As a matter of procedure, what plaintiff respectfully requests should have occurred in the District Court, and which should now be ordered to effectuate the correct result of the jury's findings of fraud and breach of a confidential relationship, is an order remanding this cause to the District Court to determine Sears' unjustly obtained profits and to order disgorgement of those profits from Sears to the plaintiff under the first two of plaintiff's three theories, being fraud and breach of a confidential relationship. The jury's finding and damage assessment under plaintiff's third theory, negligent misrepresentation, being an action in tort at law, should continue to remain unaffected. Based on the evidence,[2] plaintiff submits the amount of Sears' unjustly obtained profits can be nothing less than $44 million to the date of trial. The court as a chancellor is fully empowered to make that determination from the evidence, a determination which the jury obviously never reached because of the incorrect instruction it received.[3] Plaintiff submits that the seventh amendment right to jury trial is not

[2] Discussed more fully later at pp. 6-10.

[3] Discussed more fully later at pp. 11-12.

involved in this appeal, because, while a jury is empowered to perform and is capable of performing an accounting,[4] to have a jury do so on these equitable theories is not an absolute right, but may be performed by the chancellor, who, in any event, must effectuate the remedy.

Focusing upon the real and principal issue, the bedrock proposition which must be observed is that in an action for rescission and restitution when fraud and breach of a confidential relationship have been proved, the wrongdoer cannot remain enriched, thereby encouraging future misconduct. Plaintiff asks not that the court increase a jury award of "damages," but that the court enter the legally compelled relief which follows a finding of fraud and breach of a confidential relationship in an action for rescission.

II.

ONLY PLAINTIFF PRESENTED DETAILED ECONOMIC QUANTIFICATION OF SEARS' UNJUSTLY OBTAINED PROFITS.

By referring to testimony out of context and seriously misstating certain testimony, Sears would have this Court believe the very detailed and conservative economic analysis performed by Dr. Charles Linke, tenured economist in the Department of Finance of the College of Commerce and Business Administration, of the University of Illinois, constituted "utter speculation." We ask the Court to bear constantly in mind, however, what cost figures, price figures, overhead charges, and profit margin figures Sears introduced into evidence. The answer is—not one. Although Sears deprecates Dr. Linke's testimony by complaining that he did not know

[4] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962).

the number of Quick Release wrenches sold at the catalogue selling price, if any, at reduced sales prices, at promotional prices, or in tool sets, Sears unaccountably fails to show that Dr. Linke had requested that information and was told it was not available. (A. 423, 429, Tr. 1677, 1683).

The reason more detailed information was not available is, quite simply, that in answer to many detailed Interrogatory questions trying to elicit every aspect of Sears' sales and price data, Sears repeatedly responded that it maintained no records showing such information and that no such data was available (T. 47, 1282, 1714). Presumably those answers were true, since Sears presented not one figure at the trial. Although John Lehnhard, Sears' principal witness concerning its sales and costs, had a thick folder of papers at the witness stand during his testimony (T. 1780, 3355), he still presented not one single specific price or sales volume figure for the Quick Release wrench to the jury. As Dr. Linke testified, his analysis was based upon data taken from Sears' own Answers to Interrogatories (T. 1651). Not only did Dr. Linke request detailed data and use all of the information which Sears did disclose, he also referred to data from the U.S. Census of Manufacturers (Bureau of Census) concerning socket wrench product code 3423133 (T. 1654), data from the Federal Reserve Bulletin (T. 1665), sensitivity analysis (T. 1668), and present value theory (T. 1665). The record is crystal clear that Dr. Linke utilized the highest and best data available in reaching his conclusion.

Every assumption which Dr. Linke made was conservative, being in Sears' favor. Thus, although the data showed a 23% annual incremental increase in profit for the years 1965 through 1969, in figuring the annual incremental increase for years after 1969, Dr. Linke used

the conservative figure of 20% (T.1668, 1670). Although Sears' dollar income from sales of ratchet wrenches had been increasing dramatically each year for the decade before 1976, in estimating 1976 sales, Dr. Linke used the same figure of $26 million which Sears had actually realized in 1975 (T. 1669). Although Sears actually obtained higher prices when wrenches were actually sold some months after having been shipped, Dr. Linke used the price prevailing at the time of shipment in every instance (T. 1652). His analysis and conclusions represented a reasonable degree of economic certainty for the category of benefits representing direct incremental profit on ratchet wrench sales alone (T. 1647), were described as most fair and most conservative, and were conclusions in which Dr. Linke had great professional confidence (T. 1670, 1691). To rebut this massive and detailed proof, Sears presented no data whatever, but only the vague testimony of John Lehnhard that many of Sears' ratchet wrenches are sold in sets and at reduced sale prices.

Sears' contention that its failure to supply more detailed data concerning sales volume, costs, and pricing during pretrial discovery as well as during trial can somehow immunize it from any attempt to quantify the benefits it received, is directly contrary to decisions of this Court and others. In *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265-66, 90 L. Ed. 652, 660-61 (1945), in discussing this precise question of sufficiency of proof, this Court reasoned:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations pre-

> scribed by statute, . . . and in cases of confusion of goods, . . . the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable . . . And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. . . . Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

Similarly, rejecting defendant's contention that economic and financial calculations were "speculative," in *Grepke v. General Electric Co.*, 280 F. 2d 508, 512-13 (7th Cir. 1960), the court upheld the verdict based on plaintiff's proof of benefits defendant received from use of plaintiff's idea. Finding that defendant ". . . chose to rely entirely on the testimony of the plaintiff and offered nothing . . ." the court reiterated the well established rule that "It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damages it has suffered." *Grepke*, 280 F. 2d at 513. Indeed, many cases logically hold that when a defendant is required to *account for profits* it has unjustly obtained, plaintiff need only prove gross receipts while the burden is imposed on the defendant wrongdoer to establish any deductions, off-sets, or allocable costs, with doubts to be resolved against the

defendant. *Adolph Gottscho Inc. v. American Marking Corp.*, 139 A. 2d 281, 286-87 (N.J. 1958), *Baker v. Simmons Co.*, 325 F. 2d 580 (1st Cir. 1963), aff'd 342 F. 2d 991 (1st Cir. 1965), cert. denied, 382 U.S. 820, 15 L. Ed. 2d 67 (1965). Sears' total failure to prove any reduction from the $44,000,000 total carefully calculated by Dr. Linke from the best available data, and from the only data supplied by Sears, speaks volumes about the veracity of Sears' contention.[5]

Perhaps Sears' superficial and misleading characterization of Dr. Linke's testimony can best be refuted by reference to Sears' glaring misstatement that "Plaintiff's witnesses further conceded, and indeed it is undisputed, that each of the foregoing factors would substantially reduce the profit margin on the wrenches, thus rendering the $44,000,000 figure entirely speculative (T. 1677-1679)." Sears Br. in Opp. at 8. Reference to the trial transcript at page 1678, the very page Sears cited, shows exactly the opposite to be true. In referring to the actual data concerning the volume of wrenches sold in stores, in sets, and by catalogue, information which Dr. Linke had requested but was told could not be obtained, *Dr. Linke actually testified:*

> "They are variables that I would like to have had to consider in making my analysis but there are very good reasons why information relating to the proportion sold through the store, sold through sets, would not cause my ultimate estimation of the incremental profits realized to be substantially different than what I have just reported." (T. 1678).

[5] Indeed during the conference on instructions, counsel for Sears twice conceded that under the evidence the jury could bring in a verdict of $40 million if instructed to determine the net incremental profit realized by Sears prior to trial from the use of plaintiff's invention (T. 3267-68, 2989).

Far from conceding any reduction in profit margin on the wrenches, Dr. Linke actually testified there would be little or no difference. When Dr. Linke explained that he did consider the import of sales of wrenches in sets and offered to "review [his] logic for evaluating this if you care to have me do that," Sears' counsel responded, "We will get to that." (T. 1682-83). Not surprisingly, Sears' counsel never got to that, but when Dr. Linke was given an opportunity to explain on redirect examination, he further testified that profit margin allocated to the main selling vehicle in a tool set, the highly promotable ratchet wrench, may very well be greater than the profit margin on an individual sale and that he may very well be underestimating the profit margin for all of Sears' wrenches being sold in sets (T. 1689). The reason for this, as Dr. Linke testified, is that when tool sets are created and the pricing is determined, the sets are filled with complementary items such as sockets, Allen wrenches, and open-end wrenches which would likely not be sold unless included in the set. In addition, not every item in the set suffers a price reduction in the same percentage. Rather, the price of the wrench in the discounted set would not be less, but may well even produce a higher profit margin because the price reduction is allocated to the higher profit but complementary items (T. 1687-89). Contrary to the inference Sears raises, Dr. Linke testified that he did indeed consider the selling price of tool sets, that he knew the number of pieces and prices in the various sets, and that he did consider the import of large numbers of wrenches being sold in sets regardless of the percentage (T. 1680-81, 1683). His explanation, completely omitted by Sears in its brief, was that the import of selling wrenches in sets likely produced a higher profit margin for Sears and that his own figures probably underestimated that profit margin.

Moreover, Sears omits reference to the four other categories of benefits which both Dr. Linke and Professor Theodore Levitt, professor of business administration at the Harvard University Graduate School of Business Administration, testified *Sears undoubtedly received*, being additional profit for selling more wrenches than would otherwise have been sold (category 2), additional profit from the sale of accessories (category 3), additional profit from the sale of other hand tools (category 4), and additional profit from the sale of more general merchandise (category 5). There can be no question that Sears itself, as Professor Levitt explained, recognized that this new, highly promotable item would generate substantial store traffic and thereby substantial category 2 through 5 benefits (T. 1367-1394). Substantial monetary benefit from each of these additional categories was received by Sears because of its ability to attract customers into the store to purchase the Quick Release ratchet wrench, but none of these additional categories of benefits could be quantified within a reasonable degree of economic certainty because of the paucity of data available from Sears. Nor did Sears disclose that, in fact, these benefits were estimated by both Dr. Linke and Professor Levitt to be not less than an amount equivalent to the $44,000,000 received from the first category of direct incremental profit from the sale of Quick Release wrenches (T. 1394, 1647-49, 1672; A. 356-58). Although plaintiff's detailed economic analysis based on the most specific data available shows Sears' direct incremental profit benefit to be conservatively calculated at $44 million, Sears' actual profit from other benefits equals or exceeds that figure by at least another $44 million, an amount which plaintiff has not even requested.

Finally, the credibility of Sears' vague reference about "sets" and "sale prices" should be judged in the light of Sears' contention at trial that the catalogue price (used by plaintiff's experts) exceeded the store prices of wrenches. (T. 1281). Rebuttal proof showed that in 12 stores in northern Illinois and across the United States at the very time this trial was taking place, the store price in every instance equalled or exceeded the catalogue price (Px 211-222; T. 2697-2704).

Sears' contention (made and corrected before the Court of Appeals) that "more than two-thirds of the wrenches were included in tool sets that contained hundreds of tools" (Sears' Br. in Opp. at 8) also finds no support in the record. In fact, the very reference Sears cites (T. 1782-83) shows, to the contrary, that instead of combining "hundreds" of tools, the three largest selling tool sets contained only 88, 63, and 31 pieces respectively.

Sears' statement, repeated again in its Brief in Opposition at page 9, that "the jury was instructed to consider the value of plaintiff's patent in arriving at its verdict (A. 485)," is also demonstrably false. Reference to the instruction which the trial court formulated and gave, and which the Court of Appeals quoted (*Roberts*, 573 F. 2d at 980, n. 2) shows conclusively that the patent was not even mentioned and that the measure of recovery was unspecified, only permitting consideration of the profits and benefits Sears derived from the use of Roberts' Quick Release device.

To conclude this section, it may be helpful to consider that even taking Sears' argument at face value, that 2/3rds of its wrenches are sold in sets and that many wrenches are sold at reduced prices in stores, these generalities do not conflict with the explanation given

by Dr. Linke (omitted by Sears) which described how selling wrenches in sets at reduced prices allowed Sears to realize incremental profit even larger than his calculated figure. Because the proof fully supports the total of $44 million, which is a conservative measure of Sears' unjust enrichment, without even considering the equally valuable additional benefits Sears obtained, the $1 million verdict reached by the jury (which clearly cannot be a measure of Sears' profits) provides adequate reason for this Court to exercise its power to correct the result reached below which unjustly enriches Sears by tens of millions of dollars.

III.

PLAINTIFF DID OBJECT BUT IN ORDER TO HAVE ANY INSTRUCTION CONCERNING MONETARY RECOVERY AT ALL, WAS FORCED TO ACQUIESCE IN THE ERRONEOUS INSTRUCTION DRAFTED AND GIVEN BY THE COURT.

Again out of context, Sears quotes one passage which, if left standing alone, would appear to indicate that plaintiff's counsel agreed to and tendered the erroneous instruction which produced the unjustly low jury assessment of profits. Unfortunately, Sears did not disclose to this Court that plaintiff had tendered two forms of instruction concerning monetary recovery prior to the trial court's decision to draft its own instruction (T. 2978, 3166), that both had been refused by the court for the reason that they directed the jury to determine the amount of Sears' net profit as the measure of recovery (T. 2989-90, 3170), that the court then dictated its own instruction which plaintiff wrote out and had typed and returned to the court (T. 3191-95), and that unless the court's draft was given, no instruction concerning monetary recovery would have been given at all.

Even more importantly, in passages not quoted by Sears, plaintiff's counsel explicitly preserved plaintiff's objection to the court's draft and stated the reason the court's dictated instruction was being used. Thus, counsel said:

> "The damage instruction redrafted as per the Court's suggestion this morning. I notice, I just want to say for the record it was our understanding the court had earlier refused an instruction asking, telling the jury they had to award profits." (T. 3266)
>
> . . .
>
> "I will just say for the record, Your Honor, this is being submitted because of the Court's ruling that the jury should not be instructed that they had to bring in the profits." (T. 3269)

Sears recognizes the fact that plaintiff did everything possible to preserve his position concerning the instruction by claiming that: "Even if it was not so clear that plaintiff had tendered the instruction, he obviously failed to object . . ." Sears Br. in Opp. at 10. It is clear, to the contrary, that plaintiff did not actually "tender" the instruction and had preserved his objection. To illustrate, one need only ask what more could plaintiff have done, and still have this lengthy trial come to some conclusion? Nothing that transpired during the instruction conference stands as any bar to plaintiff's persistent request that, in accord with uniform authority since the beginning of Anglo-American jurisprudence, this fraudfeasor be deprived of its ill-gotten gains.

CONCLUSION

To date, in conflict with decisions of this Court and those of virtually every other court in the land, and as the direct consequence of an erroneous instruction to the jury at trial, and of the refusal of the court to grant equitable relief, a corporation which committed fraud and breach of a confidential relationship has been allowed to retain tens of millions of dollars in unjust enrichment. The consequence, if this result stands, is to encourage predatory business practices, since the risk of detection entails no risk of monetary loss. To correct this unjust result, plaintiff respectfully requests that his Cross-Petition For Writ Of Certiorari be granted.

Respectfully submitted,

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